SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

No. 74-1067

PAUL K. SCHUBERT, and All Others Similarly Situated,

Plaintiff-Appellant,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, a/k/a NCAA, and BALL STATE UNIVERSITY (legal Name - Trustees of Ball State University),

Defendant-Appellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's judgment against petitioner in his action charging that the NCAA 2.000 rule as to

freshman eligibility to participate in college athletics violates the Equal Protection clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

Petitioner is an avid tennis player who desired to participate in intercollegiate athletics while he was a first-year student of respondent, Ball State University. Ball State is a member of respondent, the NCAA, a voluntary unincorporated association of approximately 775 colleges, universities and other associations whose members are four-year colleges and universities. Approximately 50% of the members are private institutions. Ball State subscribes to NCAA By-Law 4-6-(b), the 2.000 Rule (the "Rule"), which provides:

> "(b) A member institution shall not be eligible to enter a team or individual competitors in an NCAA-sponsored meet or tournament unless the institution in the conduct of all its intercollegiate programs:
>
> (1) Limits its scholarship or grant-in-aid awards (for which the recipient's athletic ability is considered in any degree), and eligibility for participation in athletics or in organized athletic

> practice sessions during the first year in residence, to student athletes who have graduated from high school with a minimum grade point average of 2.000 (based on a maximum of 4.000) for all work taken. . . ."

The NCAA imposes sanctions on its members who are bound by, and who allow students to play intercollegiate athletics in violation of, the Rule. No action is taken against the students by the NCAA.

Petitioner graduated from high school with less than a 2.000 grade average and was declared ineligible by Ball State to play on its tennis team during his first year in accordance with the Rule. In his first quarter at Ball State, he received a 3.2 grade point average and in his second he received a 1.8. Averaging the two quarters he received a 2.45.

Petitioner filed this action under 42 U.S.C. §1983 against Ball State and the NCAA seeking declaratory and injunctive relief as well as compensatory and punitive damages.[1] A hearing was held

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[1]This damage claim prevents this action from being moot even though petitioner is no longer a first year student. Unlike The Board of School Commissioners v. Jacobs, ___ U.S. ___(February 18, 1975), there was never any determination made by the lower courts on the damage issue and, therefore, there was no final order

in the district court on petitioner's motion for preliminary injunction. After denial of the motion, the parties stipulated that the hearing record constituted all the evidence in the case and that the interlocutory order be accepted as a final order of dismissal. The trial court then so ordered.

On appeal, the court of appeals declined to consider whether Ball State was a "person" for purposes of 42 U.S.C. §1983, and whether enforcement by the NCAA of the 2.000 Rule constitutes "state action" for purposes of §1983. (Pet. App. A-3) It only considered whether "the 2.000 rule bears a reasonable relationship to a permissible purpose." (Pet. App. A-3)

Accepting the justifications advanced by respondents' uncontroverted evidence that the Rule was designed (1) to prevent exploitation of the young athletes most unable to meet graduation requirements, (2) to foster an image of an athlete committed to scholarship, and (3) to encourage academically troubled students to devote full time to their studies, the court of appeals held the Rule was reasonably related to those legitimate purposes. It further held that the rule was not unconstitutionally applied to petitioner, and affirmed the district court's judgment by order. (Pet. App. A-3, A-4)

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on damages from which petitioner could appeal. The parties treated the final order here as covering the liability issue only.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

The Court of Appeals Correctly Applied Settled Principles Enunciated by this Court and Its Decision Does Not Conflict with that of any other Court of Appeals.

As petitioner concedes, the court of appeals applied proper and settled Equal Protection clause principles articulated by this Court in arriving at its determination that the 2.000 Rule is constitutional. (Pet. 5) The Rule, like any eligibility rule, is plainly designed to preserve the concept of college athletics as sporting events engaged in by students. There is no contention that the rule creates a "suspect classification"[2] or that petitioner's right to play intercollegiate tennis his freshman year in college is a "fundamental right."[3] Thus,

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[2]See, e.g., Oyamo v. California, 332 U.S. 633, 644-646 (1948) (classification based on nationality; Loving v. Virginia, 388 U.S. 1, 9 (1967) (classification based on race); Graham v. Richardson, 403 U.S. 365, 371-372 (1971) (classification based on alienage).

[3]Any such contention would be fruitless in light of the holding in San Antonio Independent School District v. Rodrigues, 411 U.S. 1, 33-36 (1973), that education is not a right explicitly or implicitly guaranteed by the Constitution.

the principles applicable to the Rule are those summarized in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911), quoted in Morey v. Doud, 354 U.S. 457, 463-464 (1957):

> "1. The equal-protection clause of the 14th Amendment does not take from the state power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

At the heart of these criteria is the requirement that "the classification must be reasonable, not arbitrary and must rest upon some ground of difference

having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F. S. Royster Guano v. Virginia, 253 U.S. 412, 415 (1920); see also, Reed v. Reed, 404 U.S. 71, 76 (1971). The lower courts, in complete agreement with the only two courts of appeals to have considered the question, held there was at least this "minimum rationality" necessary to support the Rule. Parish v. N.C.A.A., 506 F.2d 1028 (CA 5 1975); Associated Students, Inc. v. N.C.A.A., 493 F.2d 1251 (CA 9 1974) (both cases involving the predecessor 1.600 non-predictor rule).

Petitioner does not contend, as he cannot, that the decisions below are in conflict either with any decision of this Court, or with that of any other court of appeals. Rather, he is forced to argue that the Rule has no rational basis because it is ineffectual with respect to some student athletes and because, in his case, his actual performance exceeded his prediction. (Pet. 6, 8) But the fact that a particular regulation may be more precisely drawn or is subject to unfair results does not defeat its constitutionality or empower the Court to second-guess those who made it. See, e.g., Jefferson v. Hackney, 406 U.S. 535, 549-551 (1972); Dandridge v. Williams, 397 U.S. 471, 485-487 (1970).

Finally, petitioner contends, without citation of authority, that this Court should exercise its discretion and grant certiorari so the Court may question the Rule's "unfair affect[sic]"

on him.[4] (Pet. 11-12). The important federal question urged to demand resolution by this Court is difficult to discern in this context since petitioner's only evidence of unfairness--that his initial college grades when he was not in varsity athletics were better than his average high school grades when he was --is as indicative of the efficacy of the Rule in encouraging scholarship as it is of unfairness.

CONCLUSION

Petitioner has not demonstated that the decision of the court of appeals conflicts with decisions of other courts of appeals or with any decisions of this Court. Since the lower courts properly applied settled Equal Protection clause principles, he has failed to establish that any important question is presented for determination by this Court. For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari to the United States Court of Appeals of the Seventh Circuit be denied.

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[4]He includes the "class of non-predictor athletes" in those unfairly affected, but the 2.0 rule is not a predictor rule, there is no evidence to show the existence of any such group of athletes or of the metes and bounds of such a group, no class was properly constituted and none was duly certified by the district court.

Respectfully submitted,

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